

1 incredible.

2 JUDGE SIPPEL: So, you're talking about the
3 witnesses, if I hear you right, you're talking about the
4 witnesses that you have chosen for trial?

5 MR. KELLETT: We have not chosen our witnesses.
6 We know who, in fact, has information about this case,
7 okay, and we have talked to them and understand what
8 information that they could produce if we were to go to
9 trial.

10 MR. SCHONMAN: We provided that list to Mr. Kay.

11 MR. KELLETT: Right.

12 MR. SCHONMAN: We have identified those
13 individuals. From that list of people, there are probably a
14 dozen.

15 MR. KELLETT: It's more than a dozen, and we
16 anticipate fewer than a dozen witnesses. So, we have not
17 chosen exactly who will put on our case. Until we have seen
18 their depositions of those people, we're not going to bring
19 in anybody who is not credible. We have people talking to
20 us whose stories change --

21 JUDGE SIPPEL: You don't have to commit to all of
22 that here.

23 MR. KELLETT: Right.

24 JUDGE SIPPEL: You really don't. All that I'm
25 looking for is some number, some estimate, some indication

1 as to what it is that you need to get ready for trial. You
2 said you already have a universe of expected witnesses.

3 Then, who do you need to depose? If you have
4 those people and you're satisfied that they're locked into
5 their story sufficiently, and putting aside now the state
6 actions and the testimony in those state actions, what is it
7 that you need under the Commission's rules to depose?

8 MR. KELLETT: Kay.

9 JUDGE SIPPEL: Mr. Kay, Mr. Sobel?

10 MR. KELLETT: Mr. Kay, he's identified a number of
11 his employees.

12 JUDGE SIPPEL: How many of those are we talking
13 about?

14 MR. KELLETT: I don't know. One of the main
15 things is, we don't have access to them, so if we depose one
16 or two of them, we may find out that it's a total waste of
17 time, you know, or we might decide that it's worthwhile to
18 go forward with a few more.

19 I think he listed a total of something like ten,
20 12 employees. Something like that. I would hope that we
21 would not have to depose all of them, but it may be the case
22 where we depose one and we find out who's got responsibility
23 for constructing and operating stations, who's got
24 responsibility for dealing with loading records, whatever.
25 This is all hypothetical, Your Honor. It may be through

1 Kay's depositions we'll be able to clearly identify who
2 among Kay's employees we should be talking to.

3 JUDGE SIPPEL: This is disturbing to hear, that
4 you're into such a speculative realm at this stage of the
5 proceeding. We're having a hearing designation and now what
6 you're telling me is you're seeking to depose in order to
7 find out who might have information.

8 MR. SCHONMAN: Your Honor, that's the purpose of
9 discovery. Mr. Friedman has provided a list of individuals
10 who have information and knowledge about the operations of
11 Mr. Kay's stations. We would like to depose some of them,
12 and we've provided information who we believe have
13 information and knowledge about the Bureau's case. Mr.
14 Friedman is going to want to depose those people. That's
15 the purpose of discovery.

16 JUDGE SIPPEL: I understand. You don't have to
17 lecture me on what the purpose is --

18 MR. SCHONMAN: I apologize. That's not the
19 intention there.

20 JUDGE SIPPEL: I'm simply telling you that what
21 I'm hearing here is you're trying to investigate a case and
22 this information somehow or other should have been obtained
23 before a hearing designation order was issued.

24 MR. KELLETT: You're correct, Your Honor. In a
25 normal situation, we would have sent a 308(b) letter and

1 obtained proper information. However, we were told by Mr.
2 Kay when we sent our first 308(b) letter and subsequent
3 308(b) letters that it was not convenient for him to tell us
4 the information we required. The Commission, based on that,
5 said, you know, you may have to do your discovery in the
6 hearing process. You know, normally the Bureau can send out
7 308(b) letters and obtain full cooperation from licensees.
8 In this instance, that did not occur. You have read the
9 letters. We sent repeated letters, trying to obtain that
10 information, predesignation.

11 JUDGE SIPPEL: All right. Again, I'm just trying
12 to get this case back on track as I said repeatedly here.
13 I've indicated this in my prehearing conference order, it
14 seems to me that it would make sense at this stage of the
15 game to get Mr. Kay on the record and take the man's
16 deposition.

17 MR. SCHONMAN: We anticipate doing that.

18 JUDGE SIPPEL: That can be done in what period of
19 time, do you think?

20 MR. SCHONMAN: Within the next several weeks.

21 JUDGE SIPPEL: Well, I think you can do it within
22 maybe the next several days, if he's available.

23 MR. SCHONMAN: Your Honor, we need to get funding
24 for travel. We need to make arrangements to travel out to
25 California. I think it's very ambitious to suggest that we

1 can do that within the next few days.

2 MR. KELLETT: You know, we might be able to do it
3 here.

4 JUDGE SIPPEL: Why can't Mr. Kay come to
5 Washington and you take his deposition here? You don't seem
6 to be giving me anything to go by. I have to be pushing,
7 and I don't understand why. All I'm trying to do is get the
8 case tried.

9 MR. SCHONMAN: Your Honor, we're trying to
10 cooperate as best we can. By the time we bring in Mr. Kay
11 for deposition or by the time we go out there to do his
12 deposition, we would like to have before us relevant
13 documents and other information, so that we can question him
14 intelligently.

15 JUDGE SIPPEL: You know, but I keep hearing it two
16 ways. You don't know what documents, you don't know what
17 information because you haven't talked to Mr. Kay, but you
18 don't want to talk to Mr. Kay until you get certain
19 information.

20 MR. SCHONMAN: We know what documents we want.

21 JUDGE SIPPEL: This case has been pending since
22 December of 1994. I mean, the man is the key to your case,
23 and you're suggesting you're not even prepared to depose
24 him.

25 MR. SCHONMAN: That's right, Your Honor, we're not

1 prepared. We need documents so that we can question Mr. Kay
2 intelligently, otherwise we run the risk of having to bring
3 him back for a second deposition, to ask him about documents
4 that we subsequently receive.

5 JUDGE SIPPEL: Well, that happens sometimes.

6 MR. SCHONMAN: That's inefficient.

7 JUDGE SIPPEL: That may be inefficient, but that
8 does happen in life.

9 MR. SCHONMAN: Your Honor, we are not trying to
10 belabor this case. We are trying to speed it up. We are
11 interested in going to trial. We want to do a proper,
12 thorough job of discovery before we go to trial, so that we
13 don't waste Your Honor's time at trial. We don't want to
14 bring in witnesses and have them testify to useless things.

15 JUDGE SIPPEL: I'm sure you won't. I'm not
16 worried about that.

17 MR. SCHONMAN: We just want to do a thorough trial
18 with discovery.

19 JUDGE SIPPEL: That is your concern. I'm not
20 worried about that. My concern is trying the case. Your
21 concern is to be prepared to meet your burden of proof and
22 your burden of presentation, and we have to do that within
23 some kind of a finite time period.

24 MR. SCHONMAN: I understand. We need documents,
25 we have interrogatories we'd like to go out with. We'd like

1 to do depositions. After that, we will be ready to go to
2 trial.

3 JUDGE SIPPEL: Well, so far, I've succeeded, I
4 think, in getting a commitment from you that you don't have
5 too many witnesses to depose.

6 MR. SCHONMAN: Correct.

7 JUDGE SIPPEL: One of those is Mr. Kay.

8 MR. SCHONMAN: Correct.

9 JUDGE SIPPEL: But, I can't get a commitment from
10 you as to when you would be prepared to depose Mr. Kay. I
11 mean, this isn't even getting to a trial date. When can you
12 depose Mr. Kay?

13 MR. SCHONMAN: Can we have a moment to discuss?

14 JUDGE SIPPEL: Surely. Before you start to
15 discuss this, let me ask Mr. Friedman. Will Mr. Kay make
16 himself available for a deposition here in Washington within
17 the next couple of weeks?

18 MR. FRIEDMAN: He would be available in Los
19 Angeles to be deposed.

20 JUDGE SIPPEL: He won't make himself available in
21 Washington?

22 MR. FRIEDMAN: I haven't raised the question. I
23 know he's in Los Angeles. I think the issue is whether he
24 has to voluntarily come to Washington for a deposition.

25 JUDGE SIPPEL: You think as a party to the case

1 that I can't order him to come to Washington for his
2 deposition?

3 MR. FRIEDMAN: I think the rules provide that his
4 deposition should be taken where he is.

5 JUDGE SIPPEL: Well, but he's a party to the case.
6 This is not a witness, just a witness. This is a party.

7 MR. FRIEDMAN: I believe even parties to the case
8 are to be deposed where they reside.

9 JUDGE SIPPEL: Well, I'll take a look at the rule
10 if you want to show it to me, but I think I certainly have
11 general responsibility and authority under the rules to
12 determine what is the most efficient way to handle a case.
13 The party is in a much different position than a witness is.

14 MR. FRIEDMAN: But, I think for purposes of
15 depositions --

16 JUDGE SIPPEL: I don't care what purpose -- well,
17 I'm not going to argue with you.

18 MR. FRIEDMAN: I think even Mr. Schonman was
19 prepared to go to Los Angeles. I think he was committing to
20 do that, subject to his getting the financing for it.

21 JUDGE SIPPEL: Yes, but that's going to take time
22 apparently.

23 What's your position on taking his position in
24 Washington, Mr. Schonman?

25 MR. SCHONMAN: That would certainly be preferable.

1 JUDGE SIPPEL: Do you think there's authority
2 under the rules to do it?

3 MR. SCHONMAN: I'd have to check that out, Your
4 Honor.

5 JUDGE SIPPEL: Okay. Assuming that he makes
6 himself available in Washington, what would be the earliest
7 time that you could depose him?

8 MR. SCHONMAN: Can we go off the record, please?

9 JUDGE SIPPEL: We'll go off the record, surely.

10 (Discussion held off the record.)

11 JUDGE SIPPEL: Back on the record.

12 Mr. Schonman?

13 MR. SCHONMAN: We would anticipate that if we get
14 prompt responses to our document request and we can carry
15 out the inspections during mid-April, that we would be in a
16 position to take Mr. Kay's deposition in Washington in late
17 April, perhaps the 29th of April.

18 MR. KELLETT: We would hope that in the next three
19 weeks we'd get a document request out ASAP, hope for a quick
20 turnaround from case counsel, hoping that within the next
21 three to four weeks, get those stations all inspected in
22 California, and then we'd be ready to go forward with Kay's
23 deposition.

24 JUDGE SIPPEL: The 29th of April, and that would
25 be either here or, as I say, I don't know what Mr. Kay's

1 interest would be in not cooperating with this effort, if
2 you want to get this case moved along.

3 MR. FRIEDMAN: We're certainly willing to
4 cooperate, but I believe, again, if they want to take his
5 deposition, they have to come to him, even if he's a party
6 to the case. He'll be in Los Angeles, subject to his
7 schedule, which I did not know I needed to know today, so I
8 can't --

9 JUDGE SIPPEL: Sure, I understand the schedule. I
10 mean, this is done all the time, but I've never had the
11 situation where there's been a party to the case that's
12 never been willing to come to Washington for something like
13 this. I'll check the rules.

14 MR. FRIEDMAN: From my experience, we have always,
15 when we've done depositions, gone to the place where the
16 party is to take his or her deposition.

17 JUDGE SIPPEL: Well, having heard that, I mean,
18 does the Bureau have the money to try this case and get it
19 ready for trial?

20 MR. SCHONMAN: Yes, I hope so. I don't juggle the
21 books, but what I can say in that respect is that the
22 Commission designated this case for hearing, so I have to
23 assume the Commission anticipated that it would cost money
24 to try the case. So, one way or the other, we are certainly
25 going to try the case.

1 JUDGE SIPPEL: Well, whatever the rules provide
2 with respect to placing the deposition for a party, and then
3 the deposition, I will expect to learn that the deposition
4 is going forward on or about the 29th of April if not
5 earlier. But, I just don't want to see this pushed out
6 further than that.

7 So, what else then needs to be done? Assuming
8 that you get Mr. Kay's deposition completed by the 29th of
9 April, you get the inspections done.

10 MR. SCHONMAN: We get the documents.

11 JUDGE SIPPEL: Well, you get the documents, but
12 let me just put that aside for a minute. You're going to
13 depose these other miscellaneous witnesses, the discovery
14 witnesses that you talked about?

15 MR. SCHONMAN: There is a likelihood that we would
16 want to depose certain other individuals, perhaps some
17 employees of Mr. Kay.

18 JUDGE SIPPEL: When would those depositions go?

19 MR. SCHONMAN: I would anticipate in May, after
20 Mr. Kay.

21 JUDGE SIPPEL: So, then, we have the loading
22 information. We put that issue to one side, recognizing
23 that that can't be resolved instantaneously. Then, there
24 are other documents. Now, have you discussed the scope of
25 these documents with Mr. Friedman when you had this meeting

1 before the conference?

2 MR. KELLETT: I don't believe so. We were
3 discussing when we thought the hearing should be and the
4 loading information.

5 JUDGE SIPPEL: What about the documents, then?
6 What's the scope of the documents that you're looking for?

7 MR. SCHONMAN: You mean, in addition to the
8 transcripts?

9 JUDGE SIPPEL: Well, I'm just picking up on what
10 you told me. You said that you need documents in order to
11 get Mr. Kay's deposition going on the 29th of April.

12 MR. SCHONMAN: Those documents would consist of
13 the transcripts from these cases, and updating our previous
14 document request to insure that we'd have the most current
15 information. Although, I might add that the previous
16 requests were, as I understand it, continuing in nature.

17 JUDGE SIPPEL: Well, how did you anticipate
18 proceeding with that? Were you going to just write counsel
19 a letter or ask him if he has anything additional to add to
20 what he's already given you, or are you going to file a
21 motion for additional documents?

22 MR. KELLETT: We're drafting a second set of
23 document requests.

24 JUDGE SIPPEL: But, they're going to be different
25 than the first?

1 MR. KELLETT: Primarily, it's going to be somewhat
2 different, the primary difference being the transcripts.

3 JUDGE SIPPEL: Right, the transcripts.

4 MR. KELLETT: Then, the other thing was to update
5 our previous request, remind them that they were continuing
6 in nature.

7 MR. SCHONMAN: Of course, we were going to renew
8 our request for the loading documents.

9 JUDGE SIPPEL: Well, that keeps coming back to
10 what was said earlier, though, that it's very clear as to
11 what is not available for loading information. Mr. Kay is
12 not in a position or he's not inclined to go out and
13 independently get that information. Whether he's in
14 violation of my order or not is a different issue. I'm
15 trying again to mechanically understand what needs to be
16 done and what's likely to get done.

17 MR. SCHONMAN: Your Honor, if I might bring up at
18 this time, I know you said whether Mr. Kay is in violation
19 of your prior order compelling him to produce is another
20 issue, you said. I would request that you express to Mr.
21 Kay that your order is still outstanding and still active.

22 JUDGE SIPPEL: Well, it is. I think that's a
23 known, but that was my instruction, that was my order in the
24 case. That's the rule, that's the law of the case until I
25 change it. I'm assuming that I'm being told that from what

1 Mr. Friedman represented this morning, that that's too much
2 of a burden and you're not going to do it.

3 MR. FRIEDMAN: I don't think that's what I said,
4 Your Honor. I said that we provided the information that we
5 have. We discovered, we went to the files, we pulled
6 thousands and thousands of pieces of paper that we had and
7 we gave it.

8 JUDGE SIPPEL: Yes, I understand that. I heard
9 that.

10 MR. FRIEDMAN: But, I don't think we have a burden
11 to generate information that isn't in our files, isn't
12 available to us, by going out and trying to track down
13 customers and develop information that we don't believe may
14 be accurate. All we can give is what we have.

15 JUDGE SIPPEL: I hear that, too, and this is
16 exactly what I said. Your position is that you don't have
17 an obligation and you're not going to go out and solicit
18 that information. You've given everything that you say are
19 in your records --

20 MR. FRIEDMAN: Right.

21 JUDGE SIPPEL: -- and that's as much as you're
22 going to do on that point.

23 MR. FRIEDMAN: That is all the accurate
24 information that we could give under oath to Mr. Schonman.

25 JUDGE SIPPEL: As I say, there's an outstanding

1 order, it hasn't been complied with, let's move on.

2 MR. FRIEDMAN: I hate to be repetitive, but I
3 would like to take for the record the position that we feel
4 we have complied with it. The way we may have given it may
5 not be to his liking, but we feel we've complied with what
6 we were told to do.

7 JUDGE SIPPEL: I'm not interested in revisiting
8 that issue. Certainly not at least for purposes of a
9 prehearing conference, anyway. I'm really trying as best I
10 can to get this case to the point where you're ready to put
11 your case on and let the chips fall where they may.

12 MR. FRIEDMAN: Yes, sir.

13 JUDGE SIPPEL: Now, I don't see anything from what
14 you've told me, aside from your feelings of frustration
15 about loading information, I don't see anything that you
16 told me today that convinces me that you can't complete your
17 discovery by the end of May. That it's impossible to
18 complete it by the end of May.

19 I'm not saying that you're not going to have to
20 work hard, but I'm saying I see no reason why this case
21 cannot be completed by the end of May, as far as your
22 discovery is concerned and what it will take you to be
23 prepared to put your case on. It may not be what you would
24 like to have, you may not have the universe of all the
25 possibly relevant information that's out there, but you

1 should be able to be able to put a prima facie case on. I
2 can't conclude that, but you certainly should have the time,
3 if there is a prima facie case to put on, to develop it
4 between now and the end of May, based on what you
5 represented to me.

6 So, you know, with that as the premise, I don't
7 see why this case can't go forward for a hearing, whether it
8 be here or in Los Angeles, on or about the 19th of August,
9 which would give you time to assemble. This case, as I say,
10 has been around since December of '94, and there has been a
11 significant amount of information exchanged. I think it's
12 come to a point now where there just has to be a day of
13 reckoning.

14 MR. FRIEDMAN: Your Honor, we haven't been able to
15 present our position in regard to the hearing date.

16 JUDGE SIPPEL: I'm talking about when the Bureau
17 should be able to put its case on. Now, I understand, your
18 view on discovery to proceed on, also, but as I understand
19 that, you've been given a list of witnesses and you want to
20 go out there and depose these people at the same time. When
21 I say you all, I mean you and the Bureau counsel.

22 MR. FRIEDMAN: Well, certainly, we don't have a
23 full list. We have a list, some of which are names of
24 corporations and we don't have individuals. WE will start
25 from that. We will go beyond that, because there are other

1 parties that a year or more ago when we were starting this
2 case, we were looking at three months of depositions there,
3 assuming good luck with all those parties responding to
4 subpoenas, which they weren't responding to after we had
5 propounded to them, and not having to change dates because
6 witnesses always want to change dates. Hopefully having the
7 Bureau available to be in Los Angeles on those days with
8 funds to do the depositions.

9 So, I think that we have a lot of that, plus we're
10 going to be occupied with the Sobel case during some of that
11 period of time. So, to think of going ahead by August just
12 is premature, we feel.

13 JUDGE SIPPEL: Well, what is that you need? The
14 burden is on the Bureau to put their case on and all you
15 have to do is meet their case. You know what their case is
16 going to be.

17 MR. FRIEDMAN: Perhaps if they at least meet the
18 burden of going forward, then we have to respond to it.

19 JUDGE SIPPEL: You're telling me that you've given
20 them all the information that they need, so what's the
21 nature of the discovery that you feel you need?

22 MR. FRIEDMAN: We need to know how to respond to
23 their case and to prepare ours if they've gone forward and
24 provided a sufficient case on their burden.

25 JUDGE SIPPEL: Well, I'm giving, as I did before,

1 I mean, I'm going back to the order before the case left me
2 going up on appeal, but there was 95M-106, which laid out
3 procedures. That would be the standards that I would
4 utilize here, too. You would have the opportunity of having
5 seen their exhibits before you have to produce your
6 exhibits.

7 MR. FRIEDMAN: You know, Your Honor, we have,
8 except for the one round of interrogatories, we've had no
9 discovery back from the Bureau. We have none of their
10 documents. We have a Freedom of Information Act case
11 pending in the District Court to try to get some of those
12 documents.

13 So, again, the way it is set out here, where we
14 have no discovery against the Bureau, we tend to be shooting
15 in the dark here. So, we expect that we will have to deal
16 with subpoenas duces tecum, subpoenas ad testificandum for
17 these witnesses, and then be battling over getting documents
18 from them.

19 We found that the last time, when these witnesses
20 wouldn't honor FCC subpoenas, we expect we'll wind up in the
21 United States District Court for the Central District of
22 California, getting subpoenas out there. To me, it looks
23 just from my experience, setting out a round of discovery
24 back in December, January and February of 1995, 1996 that
25 there were all kinds of problems that were cropping up back

1 then and they shall, I expect, repeat themselves.

2 JUDGE SIPPEL: Mr. Schonman?

3 MR. SCHONMAN: Your Honor, I'd just like to
4 comment. Any reference to the subpoenas that went out in
5 December and January was on or about the time that the
6 Commission was furloughed and there was a lot of confusion
7 as to whether witnesses felt obligated to adhere to any
8 subpoenas that were handed out. I don't think that that
9 should be viewed as indicative as to how the depositions
10 will go from here on in. That was a peculiar period of
11 time.

12 In fact, as I understand it, there came a point
13 where Mr. Friedman had to advise some of the prospective
14 deponents that they did not have to adhere to the subpoena.

15 MR. FRIEDMAN: Well, of course, when this case
16 went into hiatus, we were obligated to and did notify all
17 the parties whom we had sent subpoenas to that their
18 testimony was not needed. But, prior to that date, none of
19 them had indicated they would appear, and it was leading us
20 to some confusion and a lot of research as to how we were to
21 get them into the room out there for their deposition.

22 JUDGE SIPPEL: Well, these are third party
23 witnesses?

24 MR. FRIEDMAN: Yes.

25 JUDGE SIPPEL: In the sense that --

1 MR. FRIEDMAN: Of course, unless you're going to
2 permit us to take Bureau depositions which --

3 JUDGE SIPPEL: No.

4 MR. FRIEDMAN: -- you indicated you wouldn't,
5 we're stuck with third parties.

6 JUDGE SIPPEL: How many of these do you have to
7 depose?

8 MR. FRIEDMAN: Thirty or so.

9 JUDGE SIPPEL: Why do you need 30? Why do you
10 need so many?

11 MR. FRIEDMAN: Well, first of all, we're starting
12 out with somewhere around perhaps 20. Since that's what
13 they've told us, that there are about 20 and we believe
14 there may be about ten more who also have relevant testimony
15 to provide us.

16 MR. FENSKE: Your Honor, this was based upon the
17 Bureau's initial response to discovery, a year and a half,
18 longer than that, two years ago.

19 JUDGE SIPPEL: Well, they identified a list of, I
20 guess, what you'd call universal witnesses that might have
21 information.

22 MR. FRIEDMAN: Not all of those were individuals.
23 A number of those were entities, so we're going to wind up
24 having to start to go through the entity to find out the
25 relative individuals. They named the corporation.

1 JUDGE SIPPEL: I hear you, I understand. Well,
2 I'm just not convinced that all of that type of discovery is
3 needed. You don't even know whether or not you do need the
4 information to meet what they're alleging. You know what
5 the charges are. They're in the hearing designation order.

6 With the exception of, of course, where they're
7 going to have live witnesses who are going to testify that
8 certain events happened, but you're going to know who they
9 are, and you're going to know in advance what their
10 testimony is going to be.

11 MR. FRIEDMAN: Your Honor, this involves the
12 revocation of licenses of this client.

13 JUDGE SIPPEL: That's true.

14 MR. FRIEDMAN: We need to be fully prepared to
15 defend, and again, we don't get anything from the Bureau.
16 All we can prepare our case on is what we can discover
17 outside the Bureau. But, we're in a difficult situation
18 here. They have free rein to discover against us.

19 JUDGE SIPPEL: But, they've indicated to you,
20 they've identified who the people are that have relevant
21 information, isn't that correct?

22 MR. FRIEDMAN: No. All they told us was, these
23 are the people who could be their witnesses. They didn't
24 indicate that there might not be other people out in the
25 world who are not FCC employees who could have relevant

1 information.

2 We believe that from the people they have
3 identified as potential witnesses that they will identify to
4 us other people with relevant information that will be
5 necessary to defend our client's rights.

6 JUDGE SIPPEL: Well, again, you're being
7 speculative, as well.

8 MR. FRIEDMAN: My problem is, I don't know until I
9 start talking to these people what there is. They've got
10 all the information. I have none of it from them, and they
11 know where their case is going and I don't know where their
12 case is going. I'm here in the dark, trying to shine my
13 flashlight and find out where to go.

14 JUDGE SIPPEL: Is the Bureau prepared to give them
15 a list of the witnesses that you're going to use at the
16 hearing?

17 MR. SCHONMAN: Your Honor, they requested and we
18 provided the identity of people who have information and
19 knowledge about this case, and we provided that list. We
20 have said repeatedly that it is from that list of persons we
21 will draw our witnesses. In other words, there is not going
22 to be a witness who appears on behalf of the Bureau at the
23 trial whom Mr. Kay and his counsel have not already heard of
24 and had the opportunity to speak to. There are not going to
25 be any tricks or surprises at the hearing. They have the

1 list of the universe of people from whom we will draw our
2 witnesses.

3 Do we know who our witnesses will be at the
4 hearing? No, not yet. We have to depose some people. We
5 haven't finalized our case. We haven't concluded discovery
6 yet. After discovery, we will put together our exhibits,
7 documentary exhibits. We will also put together a list of
8 witnesses and to the extent that we can put their direct
9 cases in writing, we will do so.

10 At that point, that is when we will have our
11 definitive case. Prior to that, we've provided to them a
12 larger universe of persons, but I stress, there will be no
13 surprises.

14 I also might add that because of this private
15 lawsuit or private lawsuits in California, Mr. Kay and his
16 counsel out there have spoken to some of the people on that
17 list that I just referred to.

18 JUDGE SIPPEL: Yes.

19 MR. SCHONMAN: Now, I'd also like to say something
20 else, a reference that Mr. Friedman made a moment ago about
21 shining a flashlight in the dark. I think it's safe to say
22 that there has been an unprecedented number of FOIA requests
23 served on the Commission, pertaining to matters in this
24 case. So, in terms of obtaining documents, Mr. Kay has
25 availed himself of his statutory right to file FOIA requests

1 in an unprecedented number of occasions.

2 There have also been interrogatories served on the
3 Bureau, and as Mr. Friedman says, he plans on availing
4 himself of the right to take depositions. So, in my
5 opinion, Mr. Kay and his counsel are certainly not shooting
6 in the dark, they're not shining flashlights in the dark.
7 They are being given the opportunity, having availed
8 themselves of every opportunity to engage in discovery in
9 this case and to prepare their case.

10 MR. FRIEDMAN: At every turn, we have faced
11 problems. We have had denials of requested information.
12 We've had to go to the Court to try to appeal it and been
13 opposed. We do not have full answers to all of that. We've
14 had limited rights to get information. We still don't know
15 everything we need. To do it through discovery is the only
16 way.

17 The litigation is a commercial dispute. It
18 doesn't involve this case. Neither or nor Mr. Fenske have
19 participated in any of those depositions. They may have
20 some information in there. I haven't read almost all of the
21 transcripts. I don't know what relevance they have, but
22 certainly, we need to do our own discovery, because only our
23 discovery here is useable for this case.

24 JUDGE SIPPEL: Well, again, you don't have to
25 discover every conceivable piece of information that might

1 bear on the issue. You have to get ready to meet their
2 proof, and they put their proof on and you meet it. They're
3 going to tell you, they've already given you the list.
4 You're not going to get any surprises, from what I'm
5 hearing, and you better not. But, from the 30 or some odd
6 witnesses that they told you about, that's going to be it.
7 They're not going to be using anymore.

8 Now, maybe they can hone that down a little bit,
9 but 30 witnesses and some of these, you say some of the 30
10 have at least been deposed in the State Court, but you don't
11 know exactly for what reason. I mean, you don't know what
12 they've been asked, in other words.

13 MR. SCHONMAN: That's correct. I don't know. All
14 I do understand is that although the State Court proceedings
15 have no bearing on this case, that some of the individuals
16 were questioned about matters that are relevant to this
17 case. Beyond that, I have no further information.

18 JUDGE SIPPEL: As I say, I don't see any reason
19 why this case can't be put on in a timely fashion. I don't
20 see why everything has to be put on hold while each side
21 seeks to gain every lick of information that might shed on
22 this.

23 If you can put on your case in chief, they're
24 going to know, Mr. Kay is going to know well in advance what
25 that case is, starting certainly with the key, the key